

APPEAL NO. 010453

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 6, 2001. With regard to the only issue before him, the hearing officer determined that the decedent's death was the result of a compensable injury sustained in the course and scope of employment.

The appellant (carrier) appeals, citing case law and Appeals Panel decisions, asserting that the decedent's death was due to the act of a third person intended to injure the decedent and not directed at the decedent as an employee or because of the employment (personal animosity exception in Section 406.032(1)(C)). The respondent (beneficiary) responds, urging affirmance.

DECISION

Affirmed.

The facts are not much in dispute. The decedent was employed as a freight warehouseman for an air cargo service (employer). It was routine for the decedent to arrive at the employer's premises between 7:00 and 7:15 a.m. and open the warehouse (although business did not begin until 8:00 a.m.). On the morning of _____, the decedent and a coworker, JG, arrived at the usual time to open the warehouse. The warehouse is a large (17,000 or 18,000 square feet) building with two offices at the far end. One of the offices is a break room (the break room office) and the other office is "where we control the flights out of" the business office which contained a computer, printer, and office files, but no money. There was some hearsay testimony that the light in one or both offices was out and that the decedent and JG went to investigate. Exactly what happened as the decedent and JG entered the warehouse is best described in the police report which states:

After arriving at work this morning at approximately 0700 hours [the decedent] was confronted by a male suspect wearing a ski mask. The suspect pointed the gun at the [decedent's] head. The [decedent] yelled at a co-worker [JG] to call 911. [JG] then heard a single gunshot. He then observed the [decedent] laying on the floor dead from a gunshot wound to the forehead. The [decedent's] front pockets were turned inside out and the [decedent's] money clip was taken.

There was testimony that it was "common knowledge" that the decedent carried large amounts of cash. The beneficiary, the decedent's widow, testified that the decedent may have been carrying \$300.00 or \$400.00 cash. The operations manager testified that there was no evidence of a forced entry to the warehouse and that there had been no similar armed robberies in the 16 years that he had worked for the employer. Inexplicably, JG was not called as a witness by either party.

The beneficiary's position is that the decedent was performing his duties when he was shot by an unknown assailant. The carrier contends that it is not liable under the provisions of Section 406.032(1)(C), which provides:

that an insurance carrier is not liable for compensation if the injury arose out of an act of a third person intended to injure the employee because of a personal reason and not directed at the employee as an employee or because of the employment.

The carrier speculates that because it was "common knowledge" that the decedent carried relatively large amounts of cash and that there was no evidence of a break-in or any missing cargo, it followed that the decedent was killed by someone who was lying in wait for the decedent for the sole purpose of robbing him. The problem with that speculation is how did the assailant know which office the decedent would go to, as opposed to JG, and why pick a time and location where the decedent would be accompanied by a coworker.

The carrier cites a number of cases, most of which can be distinguished from the instant case by the fact that in most of those cases the assailant and motive for the assault were known. The carrier does cite Texas Workers' Compensation Commission Appeal No. 93715, decided September 28, 1993, and Vivier v. Lumberman's Indemnity Exchange, 250 S.W. 417 (Tex. Comm'n, App. 1923, opinion adopted), both cases where the employee was murdered by an unknown assailant. Vivier was a case which involved a night watchman robbed and killed while on duty by an unknown assailant. The Court of Civil Appeals had determined that the injury was not sustained in the course and scope of his employment, because it resulted from the actions of an outsider whose motive was robbery of the employee and not theft of the employer's property. The Commission of Appeals, in reversing, said that the personal animosity exclusion was applicable only where there existed in the mind of the assailant "antecedent malice" causing him "to follow the employee and inflict injury upon him, wherever he was to be found" The court in that case went on to state that the employee in the performance of his duties as night watchman was placed in a position where the environment contributed to his risk, a situation not present in this case. In Appeal No. 93715, *supra*, where an oil field technician was murdered by an unknown assailant, Vivier is cited, as well as several other cases, and the Appeals Panel held that "if the assault indeed had occurred while the decedent was on-duty, the decedent's injury would have been suffered in the course and scope of his employment and be compensable as long as the third person involved did not have any motives personal to the decedent for murdering him." In the present case, we have only the carrier's speculation that the decedent was murdered for the money he was presumably known to be carrying. The carrier's speculation as to the motive of the unknown assailant is insufficient to constitute the great weight and preponderance of the evidence necessary to overcome the hearing officer's decision. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Michael B. McShane
Appeals Judge